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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

UNITED STATES OF AMERICA,

Petitioner,

v.

HAGGAR APPAREL COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF OF *AMICUS CURIAE* CUSTOMS AND INTERNATIONAL TRADE BAR ASSOCIATION IN SUPPORT OF RESPONDENT HAGGAR APPAREL COMPANY

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BRIEF OF *AMICUS CURIAE* CUSTOMS AND INTERNATIONAL TRADE BAR ASSOCIATION IN SUPPORT OF RESPONDENT HAGGAR APPAREL COMPANY

STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

The Customs and International Trade Bar Association ("CITBA") submits this brief in support of the position of the Respondent, Haggar Apparel Company, seeking affirmance of the decisions of the courts below.

[1] This brief was drafted entirely by counsel for *amicus curiae* Customs and International Trade Bar Association, without assistance, monetary or otherwise, from counsel for either party. CITBA has long been recognized by Congress in comments made upon pending customs and tariff legislation. *See, e.g.*, S.Rep. No. 91-576, to accompany S. 2624, 91st Cong., 1st Sess., (1969), at 6 (recognizing CITBA's predecessor, the Association of the Customs Bar).

The Customs and International Trade Bar Association is comprised of attorneys who practice exclusively or almost exclusively in the area of customs and international trade law. The issue which is presented to the Court in this case is of the utmost importance because the opinions of the courts below accurately reflect the longstanding role of the judiciary in reviewing classification decisions of the United States Customs Service. In CITBA's view a reversal of the decisions of the courts below would not only be contrary to the clear language of the statutes governing the review of such decisions, as supported by the legislative histories; it would also seriously undermine the Constitutional requirement for uniformity in the treatment of imported articles. Reversal of the decisions of the courts below would eviscerate the reviewing role that Congress contemplated for those courts.

STATEMENT OF CONSENT

Amicus curiae, Customs and International Trade Bar Association has obtained the consent of both parties to the filing of this brief in support of Haggar Apparel Company as indicated in the enclosed letters.

SUMMARY OF ARGUMENT

1. The statutory framework governing judicial review of classification decisions of the United States Customs Service ("Customs Service") directs the specialized tribunals which have jurisdiction over such matters to exercise *de novo* review of the administrative decisions brought before them. These specialized tribunals have exercised *de novo* review in this area for over a century as reflected in a vast body of case law. Deference is such cases is therefore inappropriate.

2. In its most recent re-enactment of this statutory framework, Congress reaffirmed the subject matters which would be subject to *de novo* review by the United States Court of International Trade ("CIT") and the United States Court of Appeals for the Federal Circuit ("CAFC"). The classification

issue presented in this case is included in the description of civil actions brought under 28 U.S.C. § 2640(a) subject to *de novo* review, or as stated in the statutory language, which are subject to "determinations upon the basis of the record made before the court."[2] 28 U.S.C. § 2640(a) describes "civil actions contesting the denial of a protest under section 515 of the Tariff Act of 1930." This action was brought under 28 U.S.C. § 2640(a).

3. The General Rules of Interpretation ("GRIs") set forth in the tariff governing the classification of all imported merchandise, establish a framework for interpretation of the Harmonized Tariff Schedules of the United States ("HTSUS"), codified at 19 U.S.C. § 1202, which allows for only one correct result. Therefore, the notion of *Chevron*[3] deference, which contemplates a range of permissible interpretations, if allowed in classification cases, such as the one in issue here, would be inconsistent with the proper implementation of the HTSUS.

4. This position is further supported by 28 U.S.C. § 2643(b) because it requires, that, in all cases the CIT reach a "*correct decision.*" The Government has argued that this is "simply" a procedural statute which allows the CIT to order further administrative or adjudicatory proceedings if it is not satisfied with the evidence submitted before it in the initial proceeding. In fact, 28 U.S.C. § 2643(b) significantly expanded the court's procedural powers, and gave the CIT the authority to reach a determination which is different from any of the positions argued by any of the parties. This authority, in the case of actions brought under 28 U.S.C. § 2640(a), is consistent only with *de novo* review, because in enacting this statute Congress directed the court to make its determinations on the basis of the record made

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[2] The CAFC has recognized that this language provides for *de novo* review by the CIT. *See, e.g., Universal Electronics, Inc. v. United States*, ___ Fed. Cir. (T) ___, ___, 112 F.3d 488, 493 (1997); *United States v. Cherry Hill Textiles, Inc.*, ___ Fed. Cir. (T) ___, ___, 112 F.3d 1550, 1557 (1997); *ITT Corp. v. United States*, ___ Fed. Cir. (T) ___, 24 F.3d 1384 (1994).

[3] *Chevron U.S.A., Inc. v. National Resources Defense Council*, 467 U.S. 837 (1984).

before the court, and *not* on the administrative record.

5. The presumption of correctness of a Customs Service decision recognized by the lower courts is a rule of evidence which shifts the burden of proof to the party challenging a decision of the Customs Service and is codified at 28 U.S.C. § 2639(a). The statutory scheme does not call for or justify a separate right of deference for the Customs Service by the specialized courts reviewing classification decisions.

6. In any event, the Customs Service regulation in issue, 19 C.F.R. § 10.16(c) (hereinafter referred to as "the Regulation"), which seeks to provide guidance to a perceived ambiguity in the language of subheading 9802.00.8000 of the Harmonized Tariff Schedules of the United States ("HTSUS"), should not be entitled to deference, even under the *Chevron* standard because, as found by the CIT as well as the CAFC, its language is contrary to the statute.

7. The Regulation is also not due *Chevron* deference because the Customs Service never intended that the courts give deference to the Regulation. Customs itself described the Regulation as an interpretive regulation that was intended only to provide guidance and definitions. The Customs Service stated that the Regulation was not "intended to restrict the legal right of importers or others to a judicial review of the matters contained therein."

ARGUMENT

I. Introduction

The case presented to this Court is one which is limited to judicial review of an interpretative regulation issued by the Customs Service to provide "guidance and definitions" in understanding a legal concept provided for under one section of the tariff classification provisions, enacted by Congress as subheading 9802.00.8000, HTSUS. The regulation addresses the interpretation of the statutory phrase "operations incidental to the assembly process." Civil actions brought to dispute the government's interpretation of this statutory language must be

brought under 28 U.S.C. § 2640(a). Such actions are claims initiated by importers/taxpayers to recover excess customs duties. All actions brought under 28 U.S.C. § 2640(a) are subject to a trial *de novo*, as discussed below.

II. The Statutes Governing Judicial Review of Classification Decisions of the Customs Service Provide for *De Novo* Review by the Courts

The Customs Courts Act of 1980, P.L. 96-417, 94 Stat. 1727 (1980), empowers the CIT to exercise jurisdiction over matters arising out of the laws governing the importation, exportation and admissibility of merchandise. Furthermore, it was enacted with the intention of promoting the Constitutional requirement of uniformity of treatment of all imported merchandise, as set forth in Article I, Section 8, which reads:

> The Congress shall have the Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.

The House Report on the Customs Court Act of 1980 quotes then-Chief Judge Edward D. Re of the United States Customs Court as stating that the Act would:

> implement the constitutional mandate, which provides that 'all Duties, Imposts, and Excises shall be uniform through the United States', by utilizing the national jurisdiction of the Customs Court *to provide uniform and consistent interpretation and application of the laws involved in disputes arising out import transactions.*

H.R. Rep. No. 96-1235, 96th Cong., 2nd Sess., at 29, *reprinted in*,

1980 U.S.C.C. & A.N. 3729, 3741 (emphasis added).

With respect to 28 U.S.C. § 2643(b), the House Report makes clear that neither the court nor the importer should be constrained by a prior Customs determination with respect to review of a protest denial under section 515 of the Tariff Act of 1930.[4] Congress also recognized the *de novo* nature of the court's review of Customs Service decisions.

> Under the Customs Courts Act of 1980, the filing and denial of a protest will continue as prerequisites to the commencement of a civil action brought pursuant to proposed section 1581(a). *In addition, the bill preserves the right to a trial de novo for the review of a denied protest.*

H.Rep. No. 96-1235 at 44, *reprinted in*, 1980 U.S.C.C. & A.N. at 3755 (emphasis added).

Congress recognized that trial *de novo* was necessary if the Constitutional mandate to achieve uniformity was to be followed. In fact, throughout the history of this nation, the various judicial bodies charged with reviewing the classification decisions of the Customs Service have had this power. In addition, the history of the enactments of the various tariff laws and the ensuing litigation of Customs classification decisions before those judicial bodies consistently reflects the longstanding independent review conducted by the courts. The history of the tariff laws and the decisions interpreting those laws begins with the founding of our nation.[5]

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[4] H.Rep. No. 96-1235 at 60-61, *reprinted in*, 1980 U.S.C.C. & A.N. at 3772. The action before this Court results from the denial of Haggar's protest under section 515.

[5] Congress established a customs tariff and imposed duties on imported goods by the Tariff Act of July 4, 1789, ch. 2, 1 Stat. 24. Congress established the first laws pertaining to the administration of the tariff in 1789, and amended those laws in 1799. Act of July 31, 1789, ch. 5, 1 Stat. 29; Tariff Act of Mar. 2, 1799, ch. 22, 1 Stat. 627. The 1799 Tariff Act

provided the foundation upon which all subsequent tariff laws prior to 1922 were based. H.R. Rep. No. 248, 67th Cong., 1st Sess. 20 (1921). The most important customs officer at the time was the collector in each port of entry, who applied the tariff to imported goods by determining the classification and rate and amount of duty, and who collected duties from the importer.

Actions at common law against the decision of the collector were recognized by the courts. *Elliott v. Swartwout*, 35 U.S. (10 Pet.) 137, 156 (1836) (recognizing right of recovery against collector where importer notice is given to the collector at time of payment of dispute). Federal courts were given original jurisdiction over the acts of customs officials in 1833. Tariff Act of Mar. 2, 1833, ch. 57, § 2, 4 Stat. 632.

In the period from 1890 to 1920, specialized customs tribunals were enacted by Congress in order to alleviate the burdens placed on circuit courts hearing customs cases. In 1890, Congress created the Board of General Appraisers ("BGA"), and abolished the formal right of action against customs officials. Tariff Act of June 10, 1890, Ch. 407, 26 Stat. 131. The nine general appraisers, who were officials of the Treasury Department, heard and decided appeals from appraisement and classification decisions by customs officials at the ports of entry. Classification decisions were subject to judicial review of the law and facts involved, in the circuit court. Tariff Act of 1890, § 15. The BGA was empowered, in classification cases, to "examine and decide" the issues. Tariff Act of 1890, § 14. On appeal, the record made before the BGA was transmitted to the circuit court, but the case could then be referred to a general appraiser for receipt of further evidence. *Id.* In practice, the BGA adopted quasi-judicial procedures, particularly in classification cases. *See*, Reed, *The Role of Federal Courts in U.S. Customs & International Trade Law* (Oceana, 1997), at 83 (hereinafter "Reed").

To combat abuses by importers who would withhold evidence from the BGA in order to present it to the circuit courts, in 1908, Congress required importers to present all their evidence to the BGA. In 1909, Congress provided for a specialized appellate body, the Court of Customs Appeals, or CCA, which took over review of all customs cases from the circuit courts. Act of May 27, 1908, chap. 205, § 2, 35 Stat. 403; Act of August 5, 1909, Ch. 6, § 28, 36 Stat. 11, 105. The CCA exercised "exclusive appellate jurisdiction" to review classification and other non-appraisement cases. *Id.*, at 106. The CCA thus had funneled to it all cases pending at the time of its organization in the circuit courts. Reed, *supra*, at 89.

In recognition of the BGA's judicial nature, its name was changed to the United States Customs Court in 1926. Tariff Act of May 28, 1926,

As set forth in Note 5, the decisions of the Customs Service and its predecessor bodies were reviewed by independent

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Ch. 411, 44 Stat. 669; *cf.*, *Stone, Whitridge, White & Co. v. United States*, 129 F. 33, 36 (4th Cir. 1904) (holding that BGA was an independent tribunal, "no more subordinate to the Treasury Department than is any other court"), *rev'd on other grounds sub nom.*, *United States v. Whitridge*, 197 U.S. 135 (1905). The 1926 Act changed not only the name of the BGA, but also its fundamental character, from that of an administrative body to a judicial one; its decisions became the first stage of judicial review. Reed, *supra*, at 109-110. In 1929, the CCA became the Court of Customs and Patent Appeals, by virtue of the addition of appeals from the U.S. Patent Office. Both the CCA and the Customs Court were determined by the Supreme Court to be legislative Article I courts in 1929, which decision was in effect overturned by legislation declaring in 1956 that the Customs Court was an Article III court. *Ex parte Bakelite Corp.*, 279 U.S. 438 (1929), *overruled by*, *Glidden v. Zdanok*, 370 U.S. 530 (1962); Act of July 14, 1956, ch. 589, § 1, 70 Stat. 532; *see also*, Act of Aug. 25, 1958, P.L. No. 85-755, § 1, 72 Stat. 848 (declaring CCPA to be an Article III court). In the interim, the customs courts occupied an intermediate status above administrative agencies but clearly below full constitutional courts. Reed, *supra*, at 114.

In 1970, Congress passed the Customs Courts Act, which revamped and modernized procedures for traditional customs litigation. Under the 1970 Act, classification and appraisement challenge procedures were united and reformed. The Customs Court had exclusive jurisdiction over civil actions to review denied protests. Customs Courts Act of 1970, P.L. No. 91-271, § 110, 84 Stat. 274. The 1970 Act set forth seven types of decisions which were subject to protest, including appraisement and classification. *Id.*, *currently codified at*, 19 U.S.C. § 1514(a).

In the Customs Courts Act of 1980, Congress established the Court of International Trade ("CIT") as successor to the Customs Court. It established the exclusive jurisdiction of the CIT over cases in several import-related areas that had been heard in the district courts. The 1980 Act granted the CIT "all the powers in law and equity" of a district court. Customs Courts Act of 1980, P.L. No. 96-417, § 201, 94 Stat. 1727, 1729, *codified at*, 28 U.S.C. § 1585. The 1980 Act codified the existing *de novo* standard of review in traditional customs cases. P.L. No. 96-417, § 301, 94 Stat. at 1737, *codified at*, 28 U.S.C. § 2640(a). The 1980 Act permitted the CIT to enter money judgments, remand the action to the agency, or any other relief that is available in a district court. *Id.*, codified at 28 U.S.C. § 2643(c).

judicial or quasi-judicial bodies, whose independent nature was repeatedly emphasized. For example, in affirming a decision of the Board of General Appraisers, a predecessor body to the CIT, the Court of Customs Appeals held that the BGA was vested with judicial powers to determine the classification and duty which should be imposed. *United States v. Kurtz, Stuboeck & Co.*, 5 C.C.A. 144 (1914). Prior to the codification of *de novo* review by the Customs Courts Act of 1980, the courts considered the administrative practice of the Customs Service with respect to classification as only one of several factors to be examined in determining the correctness of the decision at issue. *See, e.g.*, *Semon Bache & Co. v. United States*, 17 C.C.P.A. 273 (1929). In that case, the Court of Customs and Patent Appeals held that "in determining the question from the record in the case," four major factors needed to be examined: "the testimony relative to the commercial designation; the judicial decisions; the administrative practice; and the legislative history of the tariff provision." *Semon Bache*, 17 C.C.P.A. at 274-275.

The Supreme Court has recognized the longstanding tradition of *de novo* review of Customs classification decisions. For example, in *Nix v. Hedden*, 149 U.S. 304 (1893), the Supreme Court affirmed a lower court's classification of tomatoes as vegetables. The lower court had reviewed the classification determination *de novo* and did not defer to the agency determination. By affirming the lower court's decision, the Supreme Court recognized that *de novo* review was appropriate in a classification decision. Similarly, in *Worthington v. Robbins*, 139 U.S. 337 (1891), the Supreme Court overruled the decision of the collector after making independent findings of fact. In that case, the Supreme Court announced a cardinal principal of customs jurisprudence: to wit, that merchandise must be appraised in its imported condition, and not, as the collector had done, on the basis of how it would ultimately be used.

In *United States v. Stone & Downer Co.*, 274 U.S. 225, 235 (1927), the Supreme Court held that the classification of merchandise by the government collector was not entitled to *res judicata* effect as to that merchandise. The Court noted that "objection to the practice [of disallowing *res judicata* effect] has

never been made before," and stated that this was "strong evidence not only of the wisdom of the practice but of general acquiescence in its validity." *Stone & Downer*, 274 U.S. at 238. The Court's refusal to grant determinative effect to the collector's classification strongly implies that the classification decision was not entitled to deference. In *Great Lakes Paper Co. v. United States*, 52 Cust. Ct. 64, 67 (1964), the Customs Court stated that "we consider it now to be settled law that *res judicata* constitutes no estoppel to a trial *de novo* and reconsideration on the merits for every entry of imported merchandise."

Congress' choice of *de novo* review in classification cases negates the fundamental presumption underlying *Chevron* deference that "Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows." *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, ___, 116 S.Ct. 1730, 1733 (1996). In the area of tariff classification decisions, Congress did not desire the agency, rather than the CIT, to possess whatever degree of discretion an HTSUS provision allows. On the contrary, Congress created a specialized tribunal -- originally the BGA, then the Customs Court, and now the CIT (*see* note 5, *supra*) -- to render *de novo* adjudications of classification disputes. Since the BGA was itself an administrative tribunal within the Treasury Department, it was the body that Congress desired to possess full interpretive authority under the Tariff Schedules. When the BGA was renamed the Customs Court in 1926, its "powers . . . remain[ed] the same as by existing law provided." Tariff Act of May 28, 1926, ch. 411, 44 Stat. 669. When the Customs Court was renamed the CIT in 1980, Congress again expressed its intention that the standard of review in litigation under 28 U.S.C. § 1581(a) would remain the same as in existing law. 28 U.S.C. § 2640(a); H.Rep. No. 96-1235, 96th Cong., 2nd Sess., at 59, *reprinted in*, 1980 U.S.C.C. & A.N. at 3770. Hence, by its statutory authority to conduct *de novo* review, the CIT retains the power of the BGA to make the authoritative and independent

interpretations of the provisions of the tariff schedules.

The enactment of section 2640(a) not only reaffirmed the longstanding history of *de novo* review by the courts of classification decisions, it also differentiated such review from the review of other agency decisions charged with administering other laws related to the importation, exportation or admissibility of merchandise.[6] The reason for the difference in standards of review becomes obvious upon examination of the differences in the nature of the underlying administrative proceedings, as well as the nature of classification decisions themselves.

III. The Courts Below Do Not Exercise *De Novo* Review in Other Agency Decisions Governing Imports

A. Congress Has Recognized the Uniqueness of the *De Novo* Standard of Review of Customs Decisions

Just one year prior to the enactment of the Customs Courts Act of 1980, Congress passed the Trade Agreements Act of 1979 ("TAA"), which provided an explicit judicial standard of review of agency decisions in antidumping ("AD") and countervailing duty ("CVD") cases. Trade Agreements Act of 1979, P.L. No. 96-39, 96th Cong., 1st Sess., Title X, § 1001, 93 Stat. 144, *codified at*, 19 U.S.C. § 1516a. This new provision directed the court to hold unlawful:

> [A]ny determination, finding or conclusion found-
>
> (A) in an action brought under subparagraph (A), (B), or (C), of subsection (a)(1) [concerning reviews of certain determinations], to be arbitrary, capricious, an abuse of discretion, or otherwise

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[6] The enactment of 28 U.S.C. § 2640(a), codifying *de novo* review of administrative decisions, does not preclude a court's giving some weight to the administrative decision, consistent with the *Semon Bache* case, 17 C.C.P.A. 273, discussed *supra*.

not in accordance with law, or

(B) (i) in an action brought under paragraph (2) of subsection (a) [concerning review of determinations on the record], to be unsupported by substantial evidence on the record, or otherwise not in accordance with law.

19 U.S.C. § 1516a(b)(1). The Statement of Administrative Action accompanying the Trade Agreements Act further explains the limited scope of review of the courts in these subject matter areas:

> Any interested party who was a party to the proceedings may seek review by the Customs Court of (1) a final affirmative or final negative determination in a countervailing duty or antidumping duty investigation and (2) the Authority's periodic review of the amount of a countervailing or antidumping duty. An interested party to the proceedings who filed or supported a petition may seek review by the Customs Court of (1) a determination by the Authority to suspend an investigation upon acceptance of an agreement and (2) a determination by the ITC with respect to the elimination of injurious effect under an agreement pursuant to which an investigation has been suspended. A final affirmative determination by the Authority or the ITC may not be reviewed until after the publication of the countervailing duty or antidumping duty order based on those determinations.
>
> *The standard for judicial review of the above determinations is whether the determinations are not supported by substantial evidence on the record or are otherwise not in accordance with law.*

Trade Agreements Act of 1979, Statements of Administrative Action, H.R. Doc. No. 96-153, Part II, 96th Cong., 1st Sess. at 537-38 (1979), *reprinted in*, 1979 U.S.C.C. & A.N. 665, 783 (emphasis added). The Senate recognized the distinction between the revised standard of review in AD and CVD cases and that applicable to customs litigation in its description of the provisions of section 1001 of the Act, which both created a new standard of review in AD and CVD cases, and modified provisions regarding a challenge brought against a customs decision via the filing of a protest. In discussing the new AD and CVD standard of review, the Senate stated:

> Section 516A would remove all doubt on whether *de novo* review is appropriate [in AD and CVD cases] by excluding *de novo* review from consideration as a standard in antidumping and countervailing duty determinations. *De novo* review is both time consuming and duplicative. The amendments made by Title I of the Trade Agreements Act provide all parties with greater rights of participation at the administrative level and increased access to information upon which the decisions of the administering authority and the International Trade Commission are based. These changes, along with the new requirement for a record of the proceeding, have eliminated any need for *de novo* review.
>
> Section 516A would make it clear that traditional administrative law principles are to be applied in reviewing antidumping and countervailing duty decisions where by law Congress has entrusted the decision-making authority in a specialized, complex economic situation to administrative agencies. Thus, review of any determination listed in subsection (a)(1) would be to ascertain whether there was a rational basis in fact for the determination by the administrative decision-

> maker. Review of determinations listed in subsection (a)(2) would proceed upon the basis of a formal administrative record and the standard of review provided is "unsupported by substantial evidence on the record or otherwise not in accordance with law."

S. Rep. No. 249, 96th Cong., 1st Sess., at 251-52 (1979), *reprinted in*, 1979 U.S.C.C. & A.N. 381, 637-638; *see also*, H.R. Rep. No. 317, 96th Cong., 1st Sess., at 180-181 (1979)(AD and CVD review). In contrast, the Senate reaffirmed that the change to the Customs Service's protest procedures was not intended to affect *de novo* review of those decisions by the courts.

> *The bill.*—Section 1001(b)(2) of the bill would amend section 515(a) [providing for importer protests] so as to require the Customs Service to include reasons in its notice of denial of a protest as well as a statement that the importer may file a civil action in the Customs Court to contest the denial.
>
> *Reason for the provision.*—This amendment conforms United States law to the obligation found in Article 11.3 of the MTN Customs Valuation Agreement. *This provision is not intended to change existing law to the effect that an importer is otherwise entitled to a trial de novo. In addition, this provision gives statutory effect to existing practice and is in no way intended to change existing law.*

S. Rep. No. 249, at 253-54, *reprinted in*, 1979 U.S.C.C. & A.N. at 639-40.

Thus, in contrast to the mandated *de novo* review of classification decisions, Congress authorized a review of agency determinations in AD and CVD cases that was limited to the

agency record and which could only be overturned if the decision of the agency was not supported by substantial evidence or otherwise not in accordance with law. In the enactment of the Customs Courts Act a year later, Congress again noted the difference:

> Proposed section 2640(a)(1) specifies the scope and standard of review applicable in a civil action commenced in the Court of International Trade.
>
> Subsection (a)(1) provides for a trial *de novo* in the Court of International Trade in a civil action commenced pursuant to section 515 of the Tariff Act of 1930. *This provision restates existing law.*

H.Rep. No. 96-1235, 96th Cong., 2nd Sess., at 59, *reprinted in*, 1980 U.S.C.C. & A.N. at 3770 (emphasis added).

> In contrast the House Report goes on to note that:
>
> [Proposed subsection 2640(b)] provides that the Court of International Trade shall review a civil action commenced under section 516A of the Tariff Act of 1930, as specified by subsection (b) of that section.

H.Rep. No. 96-1235, at 59, *reprinted in*, 1980 U.S.C.C. & A.N. at 3771.

B. The Different Standards of Review for Classification and AD/CVD Cases Are Logical Given the Different Nature of the Proceedings

1. Classification Decisions Are Not Supported By Complete Administrative Records

The difference in standards of review as reflected in the TAA of 1979 and the Customs Court Act of 1980 is logical—review of agency AD/CVD determinations is more limited than review of tariff classification determinations because the two types of administrative proceeding are so markedly different.[7] First, AD/CVD determinations are supported by a statutorily required administrative record. The AD/CVD parties have an opportunity at the agency level for notice, hearing and other due process procedures. *See*, S. Rep. No. 249, at 251-52, *reprinted in*, 1979 U.S.C.C. & A.N. at 637-638 (greater rights of participation at administrative level and record requirement given as reasons for providing "substantial evidence" standard of review of AD and CVD decisions). By contrast, the "record" in tariff classification cases frequently is comprised of a one-page protest form prepared by the importer on which the agency has checked the "denied" box or, at best, supported by a ruling letter issued by the Customs Service that is binding only on the parties to the decision. Generally, these rulings letters are brief and contain summary accounts of the facts to which they apply. Therefore, even if published, another importer who chooses to rely on such

[7] The government cites to the Supreme Court's decision in *Zenith Radio Corp. v. United States*, 437 U.S. 43 (1978) at p. 21 of its brief as supporting its proposition that "formal Treasury interpretations of tariff legislation are to be accorded 'considerable weight' in customs litigation" and that "such specialized courts" "are to 'show great deference to the interpretation given the statute by the officers or agency charged with its administration'." However, the *Zenith* Court was not concerned with classification decisions of the agency, but was reviewing a countervailing duty determination, which, as Congress made clear in its 1979 enactment, should be given deference.

a decision does so at his own risk. Likewise, there is essentially no record when the Customs Service makes a decision under an interpretive regulation.

Moreover, the importer seeking a tariff classification decision does not enjoy due process procedures and safeguards. In fact, there is no public notice of the consideration of an issue by Customs, except in rare instances where Customs has initiated a proposal to review its position in a specific area and seeks to issue an interpretive ruling. These instances, however, are rare. Thus, judicial review of AD/CVD determinations is limited to review of the administrative record with deference to agency determinations made in that record. On the other hand, the CIT may "order a retrial or rehearing for all purposes" if it is unable to arrive at the correct determination in a classification case.

2. Classification Decisions Are Governed by the General Rules of Interpretation to the Harmonized Tariff Schedules of the United States

In addition, the nature of a classification determination itself differs from an AD/CVD determination. While an AD/CVD determination is governed by a statutory framework that explicitly requires the administering agency to make interpretations and fill gaps, a classification determination requires application of a highly detailed statute consisting of thousands of statutory line items with its own internal notes and rules of interpretation. As the drafters of the internationally harmonized tariff nomenclature have explained:

> [t]o be completely sound, a classification system must associate each individual product with *a single heading* (and, as the case may be, subheading), to which that product can be simply and unequivocally assigned. Hence it must contain *rules designed to ensure that a given product is always classified in one and the same*

heading (and subheading) to the exclusion of any others which might appear to merit consideration.[8]

Thus, the Customs Co-operation Council recognized that, while there may appear to be a range of "reasonable" classifications for a particular product, there can be one and only one correct classification under the Harmonized Tariff Schedule.

This difference is reflected in the HTSUS itself. The HTSUS contains six General Rules of Interpretation ("GRIs"), taken verbatim from the international HTS nomenclature, plus one "Additional U.S. Rule of Interpretation." Taken together, these rules provide a logical, step-by-step method for determining the classification of goods under the HTSUS, and are intended to ensure that all imported goods can be assigned to a single tariff provision to the exclusion of other potentially applicable provisions. For example, the HTSUS provides that, in the event that a product cannot be classified by reference to other GRIs, the product shall be classified under the heading which occurs last in numerical order among those that equally merit consideration.[9] In other words, there are no "gaps" into which an agency may insert its reasonable determinations. The HTSUS allows for only a single correct answer. Thus, classification decisions must result in a uniform interpretation of the tariff schedule, and importers must be able to rely on court decisions which provide guidance as to the correct interpretation of tariff terms.

The government has argued, that by denying *Chevron* deference to the agency's interpretive regulations "the ultimate application of customs provisions could not be determined until completion of a cumbersome, case-by-case inquiry to obtain an ad hoc judicial 'balancing [of] the relevant factors.'" Petitioner's

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[8] Customs Co-operation Council, *Introducing the International Convention on the Harmonized Commodity Description and Coding System*, at 29 (Brussels, 1983) (emphasis added). The HTSUS is the U.S. enactment of the Harmonized Commodity Description and Coding System.

[9] General Rule of Interpretation 3(c), HTSUS.

brief at 21. The government goes on to postulate that since the CAFC has already acknowledged that the list of "relevant factors" may vary from case to case, it becomes an inherently subjective inquiry, and that "different triers of fact could reach different results on similar sets of facts." In Note 9 at p. 22 of its brief, the government asserts that since the Customs Service is required to make thousands of classification decisions on a daily basis in order to keep trillions of dollars of trade moving efficiently, it is most unlikely that Congress would have sought to deprive the agency of the "ordinary administrative authority to provide guidance to the public and its own officers by means of the interpretative regulations that Congress authorized the agency to adopt."

The government's argument is without merit. First and foremost, the Regulation is a rare anomaly within the realm of tariff classification. As noted above, the HTSUS includes thousands of provisions classifying the countless articles which enter the United States. The drafters of the HTSUS provided chapter and section notes and rules of interpretation to ensure uniformity in classification decisions. Congress never intended to burden the agency with the responsibility for issuing interpretative regulations for each and every tariff provision, and, as noted above, the Customs Service, ordinarily, will issue ruling letters that are legally binding only on the parties to whom they were issued. This longstanding administrative process of issuing binding rulings on specific factual scenarios is mandated by the hierarchy of GRI's as discussed above. Since there can only be one correct classification determination for a given importation, it would be illogical to try to interpret the scope of each tariff provision in an abstract manner. The government asks deference be given to a regulation requiring 'hat, by definition, permapressing be deemed not to be incidental to assembly because it imparts new characteristics to fabric treated in that manner. However, would the same interpretation be "reasonable" if the permapressing were applied to only one component of an assembled garment, such as a collar? The clear absurdity of applying this regulation in the example of a garment imported

with very limited permapressing is in harmony with the regular administrative practice of issuing rulings of limited application which are binding only as to the precise facts discussed in the ruling letter and only as to the parties involved in the transaction reviewed. It also lends further support to our argument that it would be contrary to the express intent of Congress as set forth in the statutory framework discussed above, to require that the Customs Service's decisions in classification cases be entitled to deference.

IV. The Requirement in 28 U.S.C. § 2643(b) That the Court of International Trade Reach a Correct Decision Is a Statutory Requirement That Is Unique to That Court

The government argues that the courts below erred in relying on the provisions of 28 U.S.C. § 2643(b) in deciding that the Regulation was not entitled to deference for two reasons: First, because it argues that "*all* courts are obviously charged with the responsibility of 'reach[ing] the correct decision' in the cases that come before them." Petitioner's brief at 15 (emphasis in original). Second, the government argues that this provision "does nothing more than provide various procedural options for the Court of International Trade when that court is not satisfied with the state of the evidentiary record in the case before it." *Id.* The government's argument is wrong on both counts. With respect to the language of the provision itself, our search of the United States Code has revealed not a single other instance in which this language to "reach the correct decision" is found with respect to the scope or standard of review of an agency action by a federal court. Further, the government's argument that this provision merely provides for various procedural options that can be exercised by the CIT is also wrong. In fact, it allows the court to consider issues not raised by either party and thereby reach a result that is substantively different from any result advocated by any of the parties appearing before it.

This interpretation was made clear by the CAFC in its decision in *Jarvis Clark Co. v. United States*, 2 Fed. Cir. (T) 70,

733 F.2d 873 (1984). The CAFC noted that the trial court, in deciding the proper tariff classification of mining cars in favor of the government, did not consider the correctness of the government's tariff classification. Instead the trial court found that the plaintiff had failed to establish the correctness of its claims as a matter of law, and that the plaintiff had not overcome the presumption of correctness[10] attaching to the tariff classification decision of the Customs Service. The CAFC discussed the history of dual burden of proof imposed upon a plaintiff challenging a Customs Service classification of imported goods, which required that the importer prove that the classification found by the government was incorrect and that the claimed tariff classification was correct. The CAFC observed that, prior to the Customs Courts Act of 1980, unless an importer proved that the classification of the Customs Service was incorrect, and, in addition, that the claimed classification was correct, the incorrect classification of the government would stand. The CAFC determined that such a result, after the changes made to the court's powers by the 1980 Act, was untenable, stating that "when the Customs Service is unable to determine where an item belongs in the tariff schedules, it is anomalous to demand that the importer provide the correct answer." *Jarvis Clark*, 2 Fed. Cir. (T) at 75, n. 3, 733 F.2d at 876, n.3.

The CAFC found that 28 U.S.C. § 2643(b) empowered the CIT to reach the correct decision regarding the tariff classification, rather than let stand undisturbed an erroneous Customs decision. *Jarvis Clark, 2 Fed. Cir. (T) at 75, 733 F.2d at 878.* The court buttressed its conclusion by reference to the legislative history in which the Congress had declared that:

> Subsection (b) has particular impact on civil actions brought pursuant to section 515 and 516 of the Tariff Act of 1930. Under existing law, for

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[10] The presumption of correctness, codified at 28 U.S.C. § 2639(a), may be regarded as the Congressional preemption of deference, as discussed below.

example, in a civil action commenced under the court's jurisdiction to entertain cases involving the classification or valuation of merchandise, if the plaintiff succeeds in demonstrating that the original decision of the Customs Service was incorrect, but is unable to establish the correct classification or valuation, the court dismisses the civil action. In effect, the court holds in favor of the United States even though the plaintiff has demonstrated that the challenged decision of the Customs Service was erroneous. *Subsection (b) would permit the court in this situation to remand the matter to the Customs Service to make the correct decision or schedule a new trial or rehearing so that the parties may introduce additional evidence.*

H.Rep. No. 96-1235 at 60-61, *reprinted in*, 1980 U.S.C.C. & A.N. at 3772 (emphasis added).

Thus, Congress intended that the court retain jurisdiction over the matter until a correct tariff description was determined. Under the provision, the court may find in favor of the government or the importer. However, the court may also find the correct classification under a totally different provision where appropriate. The court is thus empowered to classify the merchandise before it under a tariff provision with a duty rate higher than the rate originally assessed by the Customs Service, in which case the importer may be required to pay additional duties as a result of the court's reaching the correct decision. Conversely, the court may find that the correct rate of duty is less than the amount claimed by the importer to be correct, in which case, the refund of duty would be more than the amount claimed by the importer.

These possibilities are directly related to the mandate of 28 U.S.C. § 2643(b) to reach the correct decision, as proscribed

under the interpretive rules of the tariff schedules.[11] Since, as noted above, there can only be one correct decision, as implicitly recognized in the language of § 2643(b), that provision represented an important procedural change, as well an added substantive change in the law because this statute changed the rights of recovery flowing from the enactment of the Customs Courts Act of 1980. Therefore, the government's argument that this very critical language is merely reflective of the duties of any court, and provides for nothing more than some procedural options is unsupported. Contrary to the government's statement at pp. 16-17 of its brief, that "this statute does not provide, either in words or by plausible inference, that the traditional rule of deference to agency interpretations has no role in tariff classification disputes," the statute does make such deference inconsistent with the plain reading of the statute. As has been often noted, the *Chevron* doctrine contemplates a range of reasonable interpretations. However, the statutory framework of the jurisdiction of the CIT, as well as the tariff schedules are both inapposite to the notion of multiple choices. It bears repeating that there can only be one correct answer in a classification decision.

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[11] The CIT has, in fact, reached decisions different from the positions advanced by either party. For example, in *Hewlett-Packard v. United States*, Slip Op. 98-76, 1998 Ct. Intl. Trade LEXIS 75 (CIT, June 12, 1998), the CIT classified merchandise in a provision not claimed by either party. The government had classified pen plotters as drawing instruments under HTSUS subheading 9017.20.8090 and the importer had asserted that the proper classification was as automatic data processing machines under subheading 8471.92.9060. The court determined that the correct classification was as printer units incorporating at least the media transport, control and print mechanism under subheading 8471.92.6580.

V. The Presumption of Correctness Applicable to Customs Service Decisions Further Reflects Congress' Intention that Such Decisions Not Be Accorded *Chevron* Deference

The statutory presumption of correctness, codified at 28 U.S.C. § 2639(a)(1), is an evidentiary rule that shifts the burden to the party challenging the Customs Service decision to come forth with evidence sufficient to rebut that presumption. If the presumption is successfully rebutted, then the burden shifts to the Customs Service to support its determination. This presumption is in harmony with the statutory requirements of 28 U.S.C. § 2640(a) and 28 U.S.C. § 2643(b) as discussed above, in that it furthers the objectives of those provisions which require that the reviewing court exercise independent judgment and reach a correct decision.

This presumption is quite unusual in Federal law. Our research has revealed only three other areas in which a similar presumption of correctness applies. *See*, 28 U.S.C. § 2254(e)(1) (determinations of factual issues by state courts in *habeas corpus* proceedings are "presumed to be correct"), 26 U.S.C. § App. Tax Court Rule 183 (findings of fact by special trial judge are presumed to be correct); and, 29 U.S.C. § 1401(a)(3) (certain determinations by ERISA plan sponsors presumed correct). The uniqueness of the provision is an important part of the development of judicial review of customs determinations, and has a long history. However, this presumption of correctness does not incorporate judicial deference to administrative decisions. In *Universal Electronics v. United States*, __ Fed. Cir. (T) ___, 112 F.3d 488 (1997), the CAFC held that the presumption of correctness should never be construed as a means to afford deference to the agency's interpretation of the law. *Universal*, 112 F.3d at 492. A "presumption" does not generally affect the amount of deference applicable to the review of agency decisions. According to Federal Rule of Evidence 301, a "presumption imposes . . . the burden of going forward with evidence to rebut or meet the presumption, but does not shift . . .

the burden of proof in the sense of the risk of non-persuasion." *See also, e.g.*, 21 Wright and Graham, *Federal Practice and Procedure*, § 5123, at 579-80, nn. 27, 29, and 33 (giving examples of presumptions that do not encompass deference under Federal law).

The presumption of correctness may trace its origins back to the case of *Earnshaw v. United States*, 146 U.S. 60, 63 (1892), in which the Supreme Court stated that the action of customs appraisers is entitled to the benefit of the general rule "that some presumption is to be indulged in favor of the propriety and legality" of the action of quasi-judicial tribunals. *See also*, *United States v. National Starch Products*, 50 C.C.P.A. 1, 4 n.4, C.A.D. 809, 318 F.2d 737, 740 n.4 (1962), *citing*, *Arthur v. Unkart*, 96 U.S. 118 (1877) (placing burden of proof in challenge to the Custom's classification on importer challenging classification).

The purpose of the presumption has been found to be to impart stability to Customs Service rulings by inhibiting importers from filing appeals merely in order to require the government to come forward with justification of its action. *Anhydrides & Chemicals, Inc., v. United States*, __ Fed. Cir. (T) __, __, 130 F.3d 1481, 1485-86 n.2 (1997), *citing*, *Aluminum Co. of America v. United States*, 60 C.C.P.A. 148, 151, C.A.D. 1102, 477 F.2d 1396, 1399 (1973). The CIT and the CAFC have regularly noted the presumption in their discussions of the level of deference to Customs Service tariff classification decisions. *See, e.g., IKO Industries, Ltd. v. United States*, ___ Fed. Cir. (T) ___, ___, 105 F.3d 624, 626 (1997) (Customs Service did not acquire *Chevron* deference by resorting to the long-standing presumption of 28 U.S.C. § 2639(a)(1)).

The presumption of correctness, in effect, gives the Customs Service an evidentiary assist in defending its actions in the CIT. The presumption of 2639(a)(1) does not add evidentiary weight; it simply places the burden of proof on the challenger. Thus, it may be seen as a statutory form of deference provided to the Customs Service because of the *de novo* nature of the review performed by the CIT. Without the presumption, the government would be required to prove all of the facts necessary to its

decision. With the presumption, importers challenging Customs Service decisions are required to put forth sufficient credible evidence to overcome the presumption. Therefore, the presumption of correctness is part and parcel with the *de novo* review performed by the CIT.

VI. The Courts Below Correctly Determined That The Regulation At Issue Should Not Be Given Deference Because It Was In Conflict With The Statute

Notwithstanding the statutory framework discussed above, which, we submit, makes it impossible to defer to the Customs Service in the manner contemplated by the *Chevron* decision, the courts below, did, in fact, consider whether the Regulation was consistent with the underlying statute, and ultimately, found that it was contrary to the statute. Accordingly, the courts properly considered the administrative practice, but rejected that practice because it was found to be violative of the statute.

Contrary to the position taken in the government's brief at 27-28, the courts below did not conclude that the "regulation precludes every operation that 'impart[s] new characteristics' to an article from being regarded as 'incidental to assembly'." The lower courts did not overrule the Regulation on the premise that *any* process imparting a new characteristic would fail under the Regulation. To the contrary, the CIT found only that the Regulation, by disqualifying the permapressing operation at issue herein as an operation incidental to assembly, was contrary to the statute, because the Regulation deemed that permapressing was never a permissible incidental operation, regardless of its cost, or relationship to the associated assembly process, solely because it imparts new characteristics to the fabric. *Haggar Apparel Co. v. United States*, 20 CIT ___, ___, 938 F. Supp. 868, 874 (1996).

Section 10.16(c)(4) specifically states that: "[c]hemical treatment of components or assembled articles *to impart new characteristics, such as* showerproofing, *permapressing*, sanforizing, dying or bleaching of textiles [is not considered

incidental to the assembly]." 19 C.F.R. § 10.16(c)(4) (1998) (emphasis added). The courts below each found that this portion of the regulation was in conflict with the statute. The CIT found explicitly that "10.16(c) conflicts with the plain language of item 807.00,"[12] because the law "does not prohibit operations which merely impart new characteristics to the article being assembled as the regulation provides, but in fact permits a duty allowance for such improvements to the articles so long as the operation imparting those characteristics was incidental to assembly." *Haggar Apparel Co. v. United States*, 20 CIT at ___, 938 F. Supp. at 874. In affirming, the Court of Appeals cited the CIT's "thorough" opinion, in effect adopting its reasoning. *Haggar Apparel Co. v. United States*, __ Fed. Cir. (T) ___, ___, 127 F.3d 1460, 1461 (1997).

Although the CIT referred to § 10.16(c) generally, the facts of the case and its citation to the "imparts new characteristics" language make clear that its holding was limited to the permapressing exemplar. This holding is in accord with established Supreme Court case law on the issue of deference to administrative regulations which conflict with the statutes they interpret. Where an administrative action conflicts with the statutory language, the action is not accorded *Chevron* deference. *See, e.g., Immigration and Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421, 446-448 (1987) (Court refused to apply *Chevron* deference to decision found to be inconsistent with statute); *K-Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291-92 (1988) (Customs Service regulation held to be invalid where it "conflict[ed] with the unequivocal language of the statute"); *Ohio Public Employees Retirement System v. Betts*, 492 U.S. 158, 171 (1989) ("But, of course, no deference is due to agency interpretations at odds with the plain meaning of the statute itself. Even contemporaneous and longstanding agency interpretations must fall to the extent they conflict with statutory language.")

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[12] Item 807.00 is the predecessor provision to subheading 9802.00.80, HTSUS.

Chevron itself recognizes this in the first question posed under that case's analysis. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43.

In this case the Regulation does in fact contravene the statutory language given by Congress. Employing traditional tools of statutory construction, it is clear that the Regulation prohibits an action that would otherwise be permissible under the law. Logically, permapressing may chemically "impart new characteristics" to assembled goods, yet may still be "incidental to assembly," under certain facts. Yet, the Regulation would preclude any and all permapressing operations from qualifying under the statute, even those that are insignificant, which are related to the assembly process and would otherwise qualify under the "incidental to assembly" definition provided in 19 C.F.R. § 10.16(c). Indeed, that was the finding of the trial court herein. It would be inconsistent with the statute to refuse to allow a claim for duty allowance because it involved permapressing that might qualify under the statute, but would fail under § 10.16(c)(4). As *Chevron* teaches, "[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Chevron*, 467 U.S. 843, n. 9. The Court must do so here, where the Regulation clearly contravenes the language Congress used.

VII. No Deference is Required Because The Regulation Was Promulgated Solely to Provide Guidance

The courts below were also correct in declining to give deference to the Regulation, because it was issued as an interpretive regulation, which was simply intended to provide guidance to the importing public, and was never intended to fill a legislative void. The Customs Service, in its own words, indicated to the public that it never intended for the courts to give deference to the factual determinations made in the Regulation,

because it was enacted solely to provide non-binding advisory guidance to importers. In the preamble to the regulatory subchapter providing for a reduction in duties applicable to articles assembled abroad with U.S. components, the Customs Service explicitly stated that the Regulation was being issued solely to provide examples and definitions.

> Sections 10.12 through 10.23 set forth definitions and interpretative regulations adopted by the Commissioner of Customs pertaining to the construction of item 807.00, Tariff Schedules of the United States (19 U.S.C. 1202) and related provisions of law. . . . The definitions and regulations that follow are promulgated to inform the public of the constructions and interpretations that the United States Customs Service shall give to relevant statutory terms and to assure the impartial and uniform assessment of duties upon merchandise claimed to be partially exempt from duty under item 807.00, Tariff Schedules of the United States (19 U.S.C. 1202), at the various ports of entry. *Nothing in these regulations purports or is intended to restrict the legal right of importers or others to a judicial review of the matters contained therein.*

19 C.F.R. § 10.11 (1976) (emphasis added). By its own terms, the Regulation is not "intended to restrict" importers' rights to "judicial review of the matters contained therein." The Regulation was issued, therefore, with the explicit recognition that it was an "interpretive rule," as opposed to a "legislative rule." It has been long recognized that interpretive rules do not have the force of law, *i.e.*, they are subject to challenge in agency enforcement proceedings and are not entitled to the same degree of judicial deference as legislative rules. *See*, Administrative Conference of the United States, *A Guide to Federal Agency Rulemaking* (2nd Ed., 1991), at 63, *citing*, *Skidmore v. Swift &*

Co., 323 U.S. 134, 140 (1940), and, *National Latino Media Coalition v. FCC*, 816 F.2d 785, 788 (D.C. Cir. 1987). As the Court stated in *Skidmore*, "[t]he weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore v. Swift & Co.*, 323 U.S. at 140.

CONCLUSION

Based on the foregoing, CITBA, *amicus curiae*, urges this Court to affirm the decisions of the courts below.

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